Interscope Versicherung Sdn Bhd v Sime Axa Assurance Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NOS W-02-664 OF 1995 AND W-02-572 OF 1996
GOPAL SRI RAM, ABDUL MALEK AHMAD AND HAIDAR JJCA
21 APRIL 1999

Arbitration *— Agreement — Jurisdiction of court — Whether arbitration agreement would deprive a court of jurisdiction — Whether arbitration agreement would bar a party from commencing recovery action in court*

Arbitration *— Stay of proceedings — Principles applicable — Steps in proceedings — Whether filing of unconditional appearance amounts to taking of a step in the proceedings — Arbitration Act 1952 s 6*

The appellant claimed under an underwriting agreement — which contains a clause providing for arbitration — that the respondent owed it RM445,753.98 as commission and management expenses. The appellant, not relying on the arbitration clause, commenced an action for recovery. It caused a writ to be issued and served upon the respondent to which the respondent filed an unconditional appearance. Thereafter, the appellant took out a summons for judgment. The respondent did not deliver an affidavit in answer to the summons for judgment but instead filed an application to stay the action pending reference of the dispute to arbitration. When the appellant's application came up for hearing before the senior assistant registrar ('the SAR'), the respondent applied for an adjournment pending the hearing of its own application for stay. The SAR refused the adjournment and entered judgment for the appellant. The respondent's appeal to the judge-in-chambers against the order of the SAR was allowed and the judgment was set aside. Therefore, the appellant appealed ('the first appeal'). Subsequently, the respondent's application for stay came up for hearing before the SAR who dismissed it. The respondent's appeal was allowed and the appellant's suit was stayed. Again, the appellant appealed ('the second appeal'). Both appeals came before the Court of Appeal. The primary issue was whether the entry of an unconditional appearance amounted to a step in the proceedings within the meaning of s 6 of the Arbitration Act 1952 ('the Act').

Held, allowing both appeals with costs against the respondent:

(1) An agreement to arbitrate does not deprive a court of jurisdiction to entertain a dispute to which that agreement relates. A plaintiff may notwithstanding such an agreement institute proceedings in the ordinary courts. If the defendant to that action is a party to the agreement, he may compel the plaintiff to adhere to his bargain to arbitrate by asking the court to stay the action. The defendant

may do so by making an application for a stay under s 6 of the Act. However, the defendant must not have taken any other steps in the proceedings before applying for a stay (see p 533E–F). A

(2) The entry of an unconditional appearance does indeed constitute the taking of a step in the proceedings within s 6 of the Act; *Usahabina v Anuar bin Yahya* [1998] MLJU 176 followed. If a defendant intends to apply to stay an action in reliance of s 6 of the Act, he must enter a conditional appearance before moving the court. On the facts, since the respondent had taken a step in the proceedings, it lost the right to invoke s 6 of the Act. It therefore had no legitimate expectation to have the summons for judgment adjourned until after its summons for a stay had been adjudicated upon. Accordingly, the SAR was correct in refusing the adjournment sought by the respondent (see pp 534I–535C). B C

[Bahasa Malaysia summary D

Perayu telah menuntut di bawah satu perjanjian menaja jamin — yang mengandungi satu fasal yang memperuntukkan untuk timbang tara — bahawa responden telah berhutang kepadanya sebanyak RM445,753.98 sebagai komisen dan juga perbelanjaan pengurusan. Perayu, yang tidak bergantung kepada fasal timbang tara tersebut, telah memulakan tindakan untuk menuntut balik hutang tersebut. Ia telah menyebabkan satu writ dikeluarkan dan diserahkan kepada responden di mana responden telah memfailkan satu kehadiran yang tidak bersyarat. Selepas itu, perayu telah mengeluarkan saman untuk perintah. Responden tidak memberikan sebarang afidavit untuk menjawab saman untuk penghakiman tetapi sebaliknya telah memfailkan permohonan untuk menggantungkan tindakan tersebut sehingga rujukan pertikaian tersebut kepada penimbang tara. Apabila permohonan perayu dikemukakan untuk perbicaraan di hadapan penolong kanan pendaftar ('PKP tersebut'), responden telah memohon untuk suatu penangguhan sehingga pendengaran permohonan mereka untuk suatu pergantungan. PKP tersebut telah enggan menangguhkan dan telah memasukkan penghakiman untuk perayu. Rayuan responden kepada hakim dalam kamar terhadap keputusan arahan PKP tersebut telah dibenarkan dan penghakiman telah diketepikan. Oleh itu, perayu telah merayu ('rayuan pertama tersebut'). Kemudian, permohonan responden untuk suatu penangguhan telah didengar di hadapan PKP tersebut yang telah menolaknya. Rayuan responden telah dibenarkan dan tindakan perayu telah digantungkan. Sekali lagi, perayu telah merayu ('rayuan kedua'). Kedua-dua rayuan telah dibawa ke hadapan Mahkamah Rayuan. Isu asas adalah sama ada kemasukan satu kehadiran tanpa syarat terjumlah kepada satu langkah di dalam prosiding-prosiding di bawah maksud s 6 Akta Timbang Tara 1952 ('Akta tersebut'). E F G H I

Diputuskan, membenarkan kedua-dua rayuan dengan kos terhadap responden:

(1) Suatu perjanjian untuk menimbang tara tidak menghilangkan bidang kuasa mahkamah untuk melayan pertikaian yang berkaitan dengan perjanjian itu. Plaintif, walaupun wujud perjanjian sebegini, boleh memulakan prosiding di dalam mahkamah biasa. Jika defendan kepada tindakan tersebut adalah satu pihak kepada perjanjian, beliau boleh memaksa plaintif untuk mengikut kehendaknya untuk menimbang tara dengan memohon kepada mahkamah untuk menggantungkan tindakan. Defendan tersebut boleh berbuat demikian dengan membuat permohonan untuk pergantungan di bawah s 6 Akta tersebut. Walau bagaimanapun, defendan mestilah tidak mengambil langkah-langkah lain dalam prosiding-prosiding sebelum memohon untuk suatu penangguhan (lihat ms 533E–F).

(2) Kemasukan satu kehadiran bersyarat adalah terjumlah kepada suatu langkah di dalam prosiding di dalam s 6 Akta tersebut; *Usahabina v Anuar bin Yahya* [1998] MLJU 176 diikut. Jika seorang defendan berniat untuk memohon suatu tindakan pergantungan dengan bergantung kepada s 6 Akta tersebut, dia mesti memasukkan kehadiran bersyarat sebelum memohon kepada mahkamah. Berdasarkan fakta, oleh kerana responden telah mengambil langkah dalam prosiding-prosiding tersebut, ia telah hilang haknya untuk membangkitkan s 6 Akta tersebut. Oleh itu, ia tiada harapan sah untuk menangguhkan saman untuk penghakiman sehingga saman untuk penangguhan didengar. Oleh itu, PKP tersebut adalah betul kerana enggan membuat penangguhan tersebut seperti yang dipohon oleh responden (lihat ms 534I–535C).]

Notes

For cases on jurisdiction of court in an arbitration case, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 710–712.

For cases on stay of proceedings in an arbitration case, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 806–833.

Cases referred to

Lee Brothers Construction Co v Teh Teng Seng Realty Sdn Bhd [1988] 1 MLJ 459 (refd)

Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97 (refd)

Usahabina v Anuar bin Yahya [1998] MLJU 176 (folld)

Legislation referred to

Arbitration Act 1952 s 6
Arbitration Act 1950 s 4(2) [UK]

Su Tiang Joo (*Joyce Koe* with him) (*Cheah Teh & Su*) for the appellant.
Amudha Jayaraman (*Murali B Pillai & Associates*) for the respondent.

Cur Adv Vult

Gopal Sri Ram JCA (delivering judgment of the court): There are two appeals before us. With the consent of counsel, we heard them together because they arise out of the same action and are closely connected. I will refer to them for convenience as the first and the second appeal respectively. The factual matrix against which they rest is as follows.

The respondent conducts the business of general insurance. On 1 October 1980, it entered into an agreement ('the underwriting agreement') with the appellant authorizing the latter to underwrite insurance over such risks as fire and other perils. In return, the appellant was to receive a commission on the policies underwritten by it as well as its management expenses. The underwriting agreement contains a clause providing for arbitration in the event of a dispute or difference. It is of wide ambit.

Later, disputes arose between the parties. The appellant claimed that the respondent owed it RM445,753.98 as commission and management expenses. The respondent did not expressly deny this claim. Neither did it expressly admit liability. It merely said that it would have to go through its accounts to verify the appellant's claim.

The appellant was not prepared to wait. It wanted to recover the sum claimed. It did not rely on the arbitration clause. Instead, it commenced an action for recovery. It caused a writ to be issued and served upon the respondent. The respondent entered an unconditional appearance to the writ. Thereafter, on 2 May 1995, the appellant took out a summons for judgment.

Later, on 17 May 1995, the respondent filed an application to stay the action pending reference of the dispute to arbitration. Both summonses were fixed for disposal before the senior assistant registrar. But the appellant's summons came on for hearing on a date earlier than that assigned to the respondent's summons for a stay. The respondent did not deliver an affidavit in answer to the summons for judgment. However, it moved the senior assistant registrar for an adjournment of the appellant's summons until its application had been heard and disposed off. This application was strenuously resisted by the appellant. In the event, the senior assistant registrar refused the adjournment and entered judgment for the appellant on its summons. The respondent appealed to the judge in chambers. KC Vohrah J, who heard the respondent's appeal, allowed it and set aside the judgment. He held that the appellant's summons ought to have been adjourned until the disposal of the respondent's application. It is against his order that the first appeal has been brought.

A On a later date, the respondent's summons for a stay came on for hearing before the senior assistant registrar. It was opposed by the appellant. After hearing argument, the senior assistant registrar dismissed the respondent's application. The respondent then appealed to the judge in chambers. The appeal was heard and allowed by Mohd Noor Ahmad J, who directed that the appellant's suit be stayed. It is against this order that the B second appeal has been preferred.

There is only one issue that has arisen for determination before us. It is an issue common to both appeals. It turns on the meaning of the words 'any other steps in the proceedings' appearing in s 6 of the Arbitration Act 1952 ('the Act'). That section reads:

C

> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient D reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

E The effect of s 6 has been fairly worked out in the several decided cases dealing with it. I do not think it useful to go through them all in this judgment. In summary, they amount to this. An agreement to arbitrate does not deprive a court of jurisdiction to entertain a dispute to which that agreement relates. So, a plaintiff may in the face of such an agreement institute proceedings in the ordinary courts. However, the defendant to that F action, if he be a party to the agreement, may compel the plaintiff to adhere to his bargain to arbitrate by asking the court to stay the action. He may do this by making an application under s 6 of the Act. But there are conditions to be met before the court may exercise its discretion in the defendant's favour. One of these is that the defendant must not have taken 'any other steps in the proceedings' before applying for a stay.

G The primary question that has arisen acutely for decision in these appeals is whether the entry of an unconditional appearance amounts to a step in the proceedings. Here, as I have earlier observed, the respondent entered an unconditional appearance to the appellant's writ. If that is a step in the proceedings, then, the respondent obviously failed to satisfy an H essential pre-requisite postulated by the section. If it does not, then two subsidiary questions arise. They are: first, whether KC Vohrah J, was right in setting aside the final judgment entered by the senior assistant registrar; and second, whether Mohd Noor Ahmad J, was right, on the material before him, in exercising his discretion in the respondent's favour.

Let me say at once that if the respondent had not taken a step in the I proceedings, it would follow that the order of KC Vohrah J, was entirely correct. For, in my judgment, a defendant who has not taken a step in the proceedings has a legitimate expectation that he will be heard on his

application for a stay of proceedings before the plaintiff's summons for final judgment is heard. See, for example, *Lee Brothers Construction Co v Teh Teng Seng Realty Sdn Bhd* [1988] 1 MLJ 459. Although this is an observation I make in the context of s 6 of the Act, I am of the view that the proposition is of universal application in the realm of adjectival law. The decision of the Supreme Court in *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 illustrates the difficulties that are usually occasioned by adopting an opposite stance.

To return to the main issue, it has been held by several decisions at first instance that a defendant, by entering an unconditional appearance, does not take 'a step in the proceedings' within the context of s 6 of the Act. They were all considered by Augustine Paul JC, in *Usahabina v Anuar bin Yahya* [1998] MLJU 176. It is a decision upon which the appellant places utmost reliance.

The judgment in that case also contains a useful discussion of what the courts here and in England have held to constitute a step in the proceedings. After a careful survey of the relevant English case law upon the subject, the learned judicial commissioner (now a judge of the High Court), came to the conclusion that the entry of an unconditional appearance does indeed amount to a step in the proceedings. He did so on the basis that the equipollent United Kingdom statutory provision (s 4(2) of the Arbitration Act 1950), by its language, expressly excludes the entry of an appearance as amounting to a step in the proceedings. That this is indeed the position appears sufficiently from a reading of s 4(2) of the United Kingdom Arbitration Act 1950 which provides as follows:

> Notwithstanding anything in this Part of this Act, if any party to a submission to arbitration made in pursuance of an agreement to which the protocol set out in the First Schedule to this Act applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may *at any time after appearance*, and before delivering any pleading or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings. (Emphasis added.)

Section 6, however, makes no such qualification. It would appear from the judgment of Augustine Paul JC, that the decisions of Malaysian Courts that held the entry of an unconditional appearance not to amount to a step in the proceedings did so by acting upon English cases without properly appreciating that the two provisions (s 6 of the Act and s 4(2) of the United Kingdom statute) are differently constructed.

After a careful consideration of the cases upon the subject, I have reached the conclusion that *Usahabina v Anuar bin Yahya* was rightly decided and that the entry of an unconditional appearance does indeed constitute the taking of a step in the proceedings within s 6 of the Act. I find

A it unnecessary to formulate my own reasons for arriving at my conclusion. Instead, I gratefully adopt all that was said by Augustine Paul JC upon the point in *Usahabina*. It follows that the line of cases that take the contrary view were wrongly decided and ought no longer to be followed. In my judgment, if a defendant intends to apply to stay an action in reliance of s 6 of the Act, he must enter a conditional appearance before moving the court.

B

Since the respondent in the present instance had taken a step in the proceedings, it lost the right to invoke s 6 of the Act. Its summons for a stay was doomed to failure when the appellant's summons for judgment came for disposal before the senior assistant registrar. It therefore had no legitimate expectation on the facts of the present case to have the summons C for judgment adjourned until after its summons for a stay had been adjudicated upon. The senior assistant registrar was accordingly correct in exercising discretion in refusing an adjournment. The respondent had done nothing to resist the summons for judgment. It erroneously thought that its right to apply for a stay was still extant because of the preponderance of authorities in support of the view it took. KC Vohrah J, acting upon what D was at the time considered to be persuasive authority, directed that the respondent's summons for stay ought to be heard before the appellant's summons for judgment. Had he come to the conclusion, as I have, that the respondent had taken a step in the proceedings he would not have made the order that he did. It is now apparent that the foundation upon which the respondent's application rested was non-existent and that the senior E assistant registrar was accordingly right in rejecting the ground relied on by the respondent for seeking an adjournment.

But was the senior assistant registrar right in entering judgment summarily without granting the respondent an opportunity to deliver an affidavit in reply to the appellant's summons? Having regard to the F circumstances that exist in the present case, I think he was. This is not a case where the material relied upon by a defendant raises a bona fide triable issue. There was no denial of liability or quantum. There was a mere request for time to verify the claim. But, as the evidence in the record of appeal shows, the amount claimed by the appellant was extracted from the G respondent's own accounts. Hence, the evidence when taken as a whole reasonably supports an inference that the respondent was merely delaying in making payment of a sum that is justly due to the appellant.

After carefully scrutinizing the documentary evidence in the record provided to us, I am more than satisfied that it would have made not the slightest difference to the final result even if an adjournment had been H granted and the respondent had put in an affidavit in opposition. No injustice was consequently occasioned to the respondent in all the circumstances of the case.

Although the summons for stay was later proceeded with, the matter is not entirely academic in that sense because of the judgment that had been I entered against the respondent. Consequently, I would allow the first appeal, set aside the order of the learned judge and restore the order of the senior assistant registrar.

That brings me to the appeal against the order of Mohd Noor Ahmad J. Here again, the learned judge apparently proceeded upon the basis that the respondent had satisfied all the pre-requisites set out in s 6 of the Act. He took the view that the entry of an unconditional appearance did not amount to a step in the proceedings. In so holding he was obviously acting upon the line of Malaysian cases that were, in my view, wrongly decided. That is why he reversed the senior assistant registrar and directed a stay of the action. For the reasons already given, he ought not to have done so. I would therefore also allow the second appeal.

In the result, both appeals are allowed. The order staying the action is set aside. The judgment summarily entered by the senior assistant registrar against the respondent is restored to file. The respondent must bear the costs at all levels including those occasioned by these appeals.

My learned brothers Abdul Malek Ahmad and Haidar Mohd Noor JJCA. have seen this judgment in draft and agree with the reasoning and the conclusions therein.

Appeals allowed.

Reported by Andrew Christopher Simon